BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL W. KEMPIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,277
PATHNET, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL NATIONAL AMERICAN GROUP	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from the March 1, 2000 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard which ordered "Respondent/Insurance Carrier to provide list of three specialists, Claimant to choose doctor to examine and treat."

ISSUES

The Brief of Respondent and Carrier lists the following three issues:

"1. Whether or not claimant's current condition represents an injury or aggravation that arose out of and in the course of his employment with Pathnet, Inc.;

"2. Whether or not claimant met his burden of proof in establishing his entitlement to a preliminary finding of compensability under the facts and Kansas law; and

"3. Whether or not the Administrative Law Judge exceeded his jurisdiction in granting the relief requested at the Preliminary Hearing."

Claimant argues that the medical treatment he seeks is the same treatment he needed in early October 1999 when respondent cut off further authorized medical treatment. According to claimant, this occurred before he began doing regular computer work for his new employer and, therefore, the ALJ's preliminary order for medical benefits against respondent should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ALJ awarded preliminary benefits of medical treatment. Respondent contends that the claimant's current need for treatment is not the result of the work-related accident, but instead is the result of an intervening injury or claimant's subsequent work activities with another employer. Therefore, this gives rise to the jurisdictional issue of whether the claimant's current need for medical treatment is due to the admitted accidental injury that arose out of and in the course of claimant's employment with respondent. This issue is considered jurisdictional and is subject to review by the Board on an appeal from a preliminary hearing order.[1]

Respondent also contends the ALJ exceeded his jurisdiction in entering an order for benefits when there was no finding of compensability. Respondent argues that because there has not been a ruling by the ALJ on whether claimant has proven that the condition for which claimant seeks treatment arose out of and in the course of his employment with respondent, the ALJ exceeded his jurisdiction in entering his Order. In addition, this issue concerning compensability must first be decided by an administrative law judge before the Board has jurisdiction to review and decide that issue.[2] Although Judge Howard did not formally rule that the condition for which claimant was seeking medical treatment at the February 29, 1999, preliminary hearing was the direct and natural result of his employment with respondent, this is the logical inference. The Appeals Board finds that this was the ALJ's intent. It is implicit in any preliminary award of benefits that the claim is being found compensable.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

Claimant last worked for respondent on August 31, 1999. He did not leave work due to his injury. Instead, he had accepted a new position in Iowa with a different employer.

---

[1] K.S.A. 1999 Supp. 44-534a(2) and K.S.A. 1999 Supp. 44-551(b)(2)(A).

[2] K.S.A. 1999 Supp. 44-551(b)(1) and K.S.A. 1999 Supp. 44-555c(a).

[3] K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 1999 Supp. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 1999 Supp. 44-501(g).

Claimant testified that he performs essentially the same job tasks, repetitive keyboard work, in his current job with US Cellular. Claimant started his job with US Cellular on September 27, 1999. Claimant was last examined on September 21, 1999 by orthopaedic surgeon V. C. Patel, M.D., the authorized treating physician. Dr. Patel's office notes for that date read as follows:

> He's fairly confused. Therapy has not helped him much, and I had a feeling about that, too. I think it's very latent or early carpal tunnel. He's ready to move and I've recommended he find another orthopedist or hand surgeon there. I am calling to the insurance company and we will have him do the nerve conduction study, with aggravating factor like work lab or with ice water immersion. At this stage I do not think injection or release would be good idea without knowing what we are dealing with. He does understand that. He will get hold of us after he finds a surgeon in Iowa City at the University of Iowa.

Claimant never received that recommended treatment, however, because respondent terminated his medical treatment.

Claimant asserts that his current injury is the same condition that he had while working for respondent. Respondent contends that claimant has failed to prove that his work for his current employer following his August 31, 1999 last day of work for respondent has not worsened his condition and thus is an intervening cause of his current need for treatment. We disagree. Claimant testified that his condition has not worsened and there is no evidence to the contrary.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[6] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[7] Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

The Appeals Board finds the record compiled to date does not establish that there was a new injury or that there has been a worsening of the injury after claimant terminated his employment with respondent. The order for respondent to provide medical treatment should, therefore, be affirmed.

---

[6] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[7] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

As provided by the Workers Compensation Act, preliminary hearing findings are not final or binding, but are subject to modification upon a full hearing on the claim.[8]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated March 1, 2000 by Administrative Law Judge Steven J. Howard should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2000.

BOARD MEMBER

c: Michael W. Kempin, 240 Clymer Rd., Hiawatha, IA 52233
D'Ambra M. Howard, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

[8] K.S.A. 1999 Supp. 44-534a(a)(2).